YEAP LEAN SENG & 4 ORS.
v.
KOK HO TEIK & ANOR.

[Court of Appeal (Taylor, Spenser Wilkinson and Wilson, JJ.) November 19, 1951]

[F. M. — Civil Appeal No. 4 of 1951]

Japanese Judgments and Civil Proceedings Ordinance, s. 7 — Construction of s. 7 — Post-war legislation — Dealings in Land (Occupation Period) Ordinance, 1949, s. 6 — Construction of s. 6.

Section 6 of the Dealings in Land (Occupation Period) Ordinance, 1949, cannot be combined with s. 7 of the Japanese Judgments and Civil Proceedings Ordinance but introduces a limited exception.

An occupation decree, if registered in the Registry of Deeds and not set aside, is effective in favour of, and can be pleaded by, a purchaser.

Principles of the post-war legislation summarised and applied. Appeal allowed.

Cases referred to:—

(1) *Tan Khiam Wah v. Chong Fong Yeen* (1950) M.L.J. 195; 1 M.L.R. 141.
(2) *Lewis v. Berry* (1936) 1 Ch. 274.
(3) *Marshall v. London Passenger Transport Board* (1936) 3 All E.R. 83.
(4) *Craig v. Kanssen* (1943) 1 K.B. 156.
(5) *In re Shaik Ramzan, decd.* (1951) M.L.J. 93; 2 M.L.R. 88.
(6) *Suppiah Chettiar v. Ong Pee Koi & Anor.* (1951) M.L.J. 49.
(7) *Jones v. Barnett* (1900) 1 Ch. 370.
(8) *Hambrough v. Hambrough* (1909) 2 Ch. 620.
(9) *Danford v. McAnulty* 8 A.C. 456.

COURT OF APPEAL, appeal from the judgment of Jobling, J. reported at p. 77 (1951) M.L.J.

Dr. Withers-Payne and *R. D. Hume* for the appellants.

F. G. Pooley and *C. O. Lim* for the respondents.

The facts and arguments appear sufficiently from the judgments.

Cur. Adv. Vult.

Taylor, J.: — This was an action to recover possession of land sold and conveyed during the enemy occupation; the principal questions involve the interpretation of the special post-war legislation. The learned trial Judge set aside the conveyance; the purchasers appeal.

The facts are not in dispute and can be summarised for the purposes of this judgment; they occurred in two phases. The property was part of the estate of a testator who died in 1901; it was mortgaged to an English bank; there were four trustees but the estate was actually administered by two English accountants appointed by the Court as receivers and managers. In 1941 the trustees obtained an order of Court authorising the receivers to sell the land to one Lim Lean Teng for $450,000 for the purposes of paying off the mortgage and arranging final distribution to the beneficiaries; this sale was not carried out because, a few weeks later, the Japanese invaded and quickly occupied the whole of Malaya; the circumstances were changed in many ways.

The general policy of the Japanese was to govern the country by means of the existing laws and established administrative machinery, so far as they could do so compatibly with their strategy and with their own political ideas. The fact that some of the actions of their local officials (quite apart from cases of oppression) were at variance with this policy does not impair the integrity of the main idea. Their political notions differ from ours in various ways and their sense of proportion is different; they attach importance to certain matters which we regard as trivial and treat as mere detail other matters which to us are points of principle. For instance, they interned not only all the British Europeans but also the Czechs who, juridically, were their allies. Similarly, certain departures from the existing laws which appear to us wholly unnecessary may have been genuinely necessary to their minds.

Some of their local measures have a bearing on this case. They reopened the Courts, appointing senior Asian members of the local bar with English qualifications, to be judges but subject to superintendence by "Chief Judges" who were Japanese. They reopened the Land offices, the Registries of Deeds in the Settlements and the Registries of Titles in the Malay States, mostly in charge of their former Chief Clerks. They permitted the local solicitors to continue in practice so far as was feasible. In Penang, they placed Mr. Chua who, before the invasion, had been Assistant Public Trustee and Assistant Custodian of Enemy Property for the Settlement, in charge of the same office. They published a "decree" which is in the nature of a general vesting order and would, in a British administration, have been included among the Statutory Rules and Orders and which, *de facto* at least, empowered him to administer properties previously controlled by persons regarded as enemies of Japan. Their financial

policy might be described as "controlled inflation"; they introduced an inconvertible paper currency, expressed in dollars, which nominally had the same value as the pre-war Malayan dollar but in fact depreciated continuously throughout the occupation and finally became utterly valueless. The branches of the English banks were liquidated but the local banks resumed business — of course in Japanese currency. As the two classes of banks had large accounts with one another some intricate problems were "carried forward." Ostensibly, ordinary business went on much as before but the volume was small because almost all overseas trade was cut off and in fact nearly every transaction was overshadowed, if not by the gestapo, by the risk of some more or less arbitrary interference by a Japanese official.

Against this background, the facts of the second phase may be outlined. Three of the trustees were out of the jurisdiction, two in Hongkong and one in Ipoh; the fourth was in Penang; the receivers were both interned in Singapore. The liquidator of the bank called in the mortgage money and pressed Mr. Chua for payment. Mr. Chua first of all tried to carry out the sale previously authorised but Lim Lean Teng was not in a position to complete; he then resorted to the Japanese court for directions; the file of the previous action had been lost in the invasion but the solicitors' office copies of the proceedings had survived; they obtained an order appointing a daughter-in-law of the deceased to represent the infant and absent beneficiaries, an order for sale by tender and finally an order authorising the execution of a conveyance to the successful tenderer and his nominees. The conveyance was duly registered and the purchasers took possession of the land. The price obtained was $935,000 in Japanese currency which, allowing for the degree of inflation at that date, approximates to the pre-war price. Mr. Chua paid off the mortgages and distributed the surplus, the shares of absent beneficiaries being paid into Court; in short, he carried out the pre-war scheme as nearly as possible and in fact with little real variation. Nothing more happened until after the war.

On Liberation, the Malayan legislatures were faced with the task of adjusting the complicated results of more than three years under the conditions which have been described — not only as between parties who were in the territory throughout but also as between parties, one of whom had been here and the other beyond the line of war. The principal measures fall into two groups. The first, or interim, group included a moratorium, the Courts (Restriction of Jurisdiction) Ordinance, 1946, which was a moratorium on suits arising out of occupation transactions, and a statute providing for review of the decisions of the Japanese controlled courts. Then there was an interval of several years during which the restrictions of the moratorium legislation were relaxed in stages and measures were devised to effect final settlements of occupation problems. These measures included the Debtor-Creditor (Occupation Period) Ordinance, 1948, which provides for adjustment of transactions involving Japanese Currency and two ordinances passed in 1949 for rectifying occupation dealings in land. On the coming into force of the two last, the Moratorium and the Jurisdiction Ordinance were repealed. The material features of this scheme of legislation may be briefly described.

The Moratorium and the Jurisdiction Ordinance explain the delay between Liberation and the commencement of this action.

The Japanese Judgments and Civil Proceedings Ordinance, 1946, is original. No British territory had ever before been occupied by an enemy and afterwards recovered in comparable circumstances; there was no relevant statute or precedent; in the absence of special legislation, parties would have sued on occupation decrees and their validity would have been challenged, one by one, on various grounds; it is a question how far the Courts would have had jurisdiction in such matters and many other doubts would have arisen owing to the vagueness of international law. It was manifestly impractical to treat all occupation judgments either as valid or as invalid. It was therefore decided to make no presumption either way but to treat them as voidable or capable of being adopted, according to circumstances. In the Judgments Ordinance (as it may be shortly called) "decree" has a wide meaning including judgments, orders and grants of representation. A party dissatisfied with a Japanese decree could apply to set it aside and a party desiring to rely on it could apply for a post-war decree in its place — without necessarily proving the facts over again. It is nowhere provided in terms that an occupation decree shall be invalid unless substituted but, since a decree can rarely be used except for some formal purposes, if no application is made, an occupation decree is virtually avoided. This Ordinance deals with occupation decrees in relation to litigation; it makes no provision for their effect in relation to dealings in land; nevertheless it covered all cases capable of arising at the time when it came into operation because the Moratorium and the Jurisdiction Ordinance were then in full force, so that nothing could be done with or

under an occupation decree affecting land. The Judgments Ordinance was intended to be transitory; when it was passed it aimed at causing all Japanese decrees to be either substituted or abandoned within six months but so many people were overseas and post-war conditions were so difficult that the period proved inadequate and power was given to extend the time in individual cases. Actually this Ordinance never had much effect, apart from probate matters; a few miscellaneous decrees were substituted; it is still in force but by 1949 it was nearly spent.

The principles of the Debtor-Creditor (Occupation Period) Ordinance, 1948 were examined in *Tan Khiam Wah v. Chong Fong Yeen*[1], and it is sufficient to say here that it prescribes rates by which a sum in Japanese currency at any given date can be converted into post-war Malayan currency.

The law of the Settlements relating to land is fundamentally English law but modified by the Registration of Deeds Ordinance, (Cap. 121 of the revised edition of 1936) which provides that no instrument affecting land shall be admissible in evidence unless registered. The land laws of the Malay States are founded on the Torrens system. Consequently separate statutes were necessary for the two groups of territories and they are called respectively the Dealings in Land (Occupation Period) Ordinance, 1949 and the Titles to Land (Occupation Period) Ordinance, 1949; both came into force on the 1st October in that year. Their principles are the same but they differ in form and detail, to suit the different systems to which they relate. For three years registration had gone on, ostensibly under the existing laws but often without proper conformity to them and sometimes in contravention of their provisions; also a number of transactions were affected by duress and other forms of Japanese interference; thus, there were many doubts and injustices to be removed and remedied. Security of title to land is vital to a country dependant on agriculture and mining. The necessary and manifest object of this legislation was to give a reasonable opportunity for anyone adversely affected by an occupation transaction to apply for relief and, subject to that opportunity, to make all past mutations unquestionably valid.

In this action the trustees sought to set aside the conveyance to the purchasers and to recover the land for the estate on the ground that Chua and the one trustee were not effectively authorised to sell; in short, they pleaded *non est factum;* they offered to return the post-war equivalent of the $935,000. The defence was that the purchasers, having registered their conveyance, acquired a good title which became absolute by operation of the post-war legislation. The main question is one of construction of particular provisions of these special statutes. The plaintiffs attacked the orders made by the Japanese-controlled court. In the Judgments Ordinance "decree" includes order; section 7 runs :—

"7. No Japanese decree shall be pleaded by way of set-off or counterclaim or otherwise in any proceedings unless the judgment, order, decree or grant of an appropriate Court has been substituted for such Japanese decree under the provisions of section 5 of this Ordinance."

When this was enacted the *ejusdem generis* rule applied. The Interpretation Ordinance, 1948, introduced a section new to this country, reading :—

"45. Where, in any written law, the words 'or', 'other' or 'otherwise' are used, they shall, unless the contrary intention appears, be construed disjunctively and not as implying similarity, unless the word 'similar' or some other word of like meaning is added."

This section is said to come from Kenya; the draughtsman, or the printer's devil, may have tinkered with it in transit; as it stands is ungrammatical. It is supposed to abolish or reverse the *ejusdem generis* rule. Whatever its precise effect may be, it appears to upset the settled construction of many older states. The plaintiffs say the result in this instance is that no Japanese decree, unless substituted, can be pleaded in any circumstances whatever.

The Dealings Ordinance is concerned with decrees only incidentally and for its own special purposes. Section 6 provides :—

"(2) Where a Japanese decree was registered, whether provisionally or finally, or a mutation effected by a Japanese decree was registered, during the occupation period or has been registered after the expiration of that period and before the expiration of three months from the commencement of this Ordinance or such extended time as the Court may allow, such Japanese decree, unless it has been set aside or in so far as it has not been set aside by the Court either before the commencement of this Ordinance or in an action begun within six months after such commencement, shall, in favour of a purchaser deriving title, whether mediately or immediately, to any estate or interest in land through or under such decree, have the same validity, force and effect as if it had been made by a court of competent jurisdiction, and the provisions of section 75 of the Conveyancing and Law of Property Ordinance shall apply to such Japanese decree in the same manner as if it were an order of the court to which that section applies.

"(3) Notwithstanding any provision as to time contained in the Japanese Judgments and Civil Proceedings Ordinance, 1946, an application to set aside or appeal against a Japanese decree affecting land or an application to substitute a judgment, order, decree or grant of the appropriate Court for a Japanese decree affecting land made under section 3 or section 5 of that Ordinance may be made within six months from the commencement of this Ordinance.

"(4) The word 'action' in sub-section (2) of this section, shall include any application to the appropriate Court under the Japanese Judgments and Civil Proceedings Ordinance, 1946, to set aside, or for liberty to appeal against, or to have a judgment, order, decree or grant of that Court substituted for, a Japanese decree."

At the hearing of the suit the defendants' counsel argued that these provisions repeal by implication section 7 of the Judgments Ordinance, *supra,* and the learned trial Judge examined them from this angle. It was hardly the correct approach. The earlier statute dealt with decrees generally; the later one dealt with some decrees in specified circumstances. The later may modify the effect of the earlier but it is not a case of repeal. In *Lewis v. Berry*[2], it was said that the Court does not imply repeal unless it is impossible to make the two sections stand together. He seems to have read this very strictly and literally as meaning "unless the applicable provisions of the two sections can be combined together into a single canon"; he proceeded to combine them and concluded that a Japanese decree, when registered, has the same effect as a competent decree, except that it cannot be pleaded unless a post-war decree has been substituted within six months from the commencement of the Dealings Ordinance; this did not appear to him to be anomalous or inconsistent. With all respect it may be suggested that his canon, is not free from anomaly; the six months had elapsed long before the trial; if a decree cannot be pleaded it is of very little use. To say that it has the same effect as a competent decree except for all important purposes is an obscure way of saying that it does not have the same effect. In short, this construction really makes the earlier statute prevail over the later one. Also he failed to consider section 75 of the Conveyancing and Law of Property Ordinance (Cap. 118 of the revised edition of 1936) though it was cited. (p. 31 E.); this provision corresponds to section 70 of the English Conveyancing Act, 1881, L.R. Stat. p. 146; it validates registered decrees in favour of purchasers, without affecting the rights of beneficiaries to follow the proceeds of sale.

Having held that the purchasers could not plead the occupation decrees the learned trial Judge went on to say that their claim to the land was unsupported and that the trustees had established their right to recover the land. Here again his approach is questionable; the action was substantially one for ejectment; it was for the plaintiffs to prove their right; they said; — "The conveyance is bad and the purchasers cannot support it by pleading the decrees." The Judge said : — "They cannot plead the decrees so the trustees are entitled to the land." It did not follow; he wrongly shifted the onus. Assuming that the pleas based on the occupation decrees were struck out of the defence, the purchasers had still pleaded possession under a registered conveyance of the legal estate. It was necessary for the plaintiffs to shew affirmatively that the conveyance was bad; the evidence and arguments adduced for this purpose were never examined.

Where conflict or repeal by implication is alleged the question is not whether the two apparently inconsistent provisions can be combined but whether they can stand concurrently as parts of a consistent system. The Judgments Ordinance dealt with decrees as matters of litigation; the Dealings Ordinance dealt with titles. To say that a registered decree is valid in favour of a purchaser is not to say that it can be pleaded by anyone else. The general provision as to pleading remains. It is not a case of repeal even of part of a section. The later statute introduces only a limited exception to the earlier one. In favour of a purchaser, a registered occupation decree, if not set aside, is equivalent to a competent decree; therefore, if and where he could plead a competent decree he can plead a registered occupation decree; the exception goes just as far as it must in order to carry out the later statute and for all other purposes the earlier one stands.

The respondent trustees argued that by their reply (paragraph 7, page 12, F.) they made an application to set aside the occupation decrees in question and they invited the Court of Appeal to set them aside. This submission was based on the words : — "in an action begun within six months ....." in section 6(2) of the Dealings Ordinance, *supra.* The Ordinance commenced on 1st October, 1949; the writ was issued on 22nd December, 1949; the reply was dated 22nd August, 1950; it was then too late to commence a separate proceedings to set the decrees aside under the Judgments Ordinance; the suggestion therefore is that by reason of the word "action" such an application can be made in the course of an ordinary suit.

This question goes much deeper than mere procedure. In its terms, the Judgments Ordinance is quite general; its effect was at first limited by the Moratorium but on the coming into operation of the Dealings Ordinance its scope was extended to decrees affecting land; thus for practical purposes it has been comprehensive at every stage and it has never before been suggested that there was any other jurisdiction to review Japanese decrees. Can it be said that this position is altered by section 6(2) of the Dealings Ordinance? The first reference to setting aside in that sub-section is : — "... unless set aside ... before the commencement of this Ordinance" that cannot refer to anything but an application under the Judgments Ordinance. The argument necessarily involves the proposition that by using the word "action" — a very general word — in the next limb of the same sentence, the legislature have created a separate concurrent

jurisdiction to deal with occupation decrees, provided that they affect land. The wide meaning given to the word "action" by sub-section (4) is easily explained. The lower courts do not try questions of title but they had a limited jurisdiction to grant letters of administration of estates which sometimes included land; it might well be necessary for a party to an action in the High Court for relief under the Dealings Ordinance to apply first to an appropriate lower court to set aside a decree of a lower occupation court. The lower Courts have their own procedure which does not comprise motions.

The word "action" covers any application regarding a Japanese decree, by whatever process commenced. Sub-section (3) grants to those concerned a statutory extension of time, for the same period of six months as is mentioned in sub-section (2), to enable them to proceed under the Judgments Ordinance. It is to be noted that under neither of these sub-sections is the period of six months extensible by the Court. These are clear indications that the legislature had the principle of limitation strongly in mind and that the word "action" in sub-section (2) means a proceeding under the Judgments Ordinance.

The appellants are in dilemma; if their application is under the Judgments Ordinance they must join the Custodian, which they have not done and probably could not do; if it is under the Dealings Ordinance they must show that the section gives the Court power to deal with such a matter and this also they have failed to do.

On a proper construction of the legislation it was not open to the plaintiffs to make an originating application for this purpose in their reply. In any event the plea in the reply was not such an application and if it had been one it would have been bad as a matter of pleading. The result is that the orders are effectual in favour of the purchasers.

The trial Judge did not decide whether the orders were good or bad; he held only that they could not be pleaded. On the view taken here that, good or bad, they are equated to competent decrees, it is not strictly necessary to examine the question of their merits but as it was argued in both Courts the main points raised may be noticed briefly.

It is true that the representation order was made on a separate Originating Summons but that is a matter of mere procedure; the daughter-in-law's solicitor appeared on the substantive application and everybody knew that he did so to represent her wards *ad litem;* Hongkong was not beyond the line of war but communications were very difficult; it was not shewn that the attorney of the absent trustees was appointed for trust purposes and in any event he was at Ipoh which is beyond the jurisdiction. All these are secondary matters; the real question was how the trustees were to satisfy the liquidator of the bank and nothing that any of the trustees or beneficiaries could have done would have been likely to influence the Japanese official; also it is said that the mortgage was repayable by instalments but even if it be assumed that the liquidator would have accepted them, how could Mr. Chua be assured of always having the funds in time? If any instalment were late the liquidator might force a sale at a bad time for the estate — quite apart from the fact that money was falling in value. It is true that in the events which happened a portion of the money was lost, whereas the property has survived, but this could not be foreseen; it was a result of the peace rather than of the war. Probably the Japanese could never have redeemed all their paper money at par but that is not to say that the Allies might not have compelled them to make good money belonging to private depositors, held by their local officials and paid (as it all was) into the Yokohama Specie Bank; later in the war Penang was bombed a second time and the property must have been ruined. Things must be judged in the light of contemporary realities; the purchaser took the war-risk on the property; the estate paid off a pre-war mortgage; as to the balance of the proceeds, some of the beneficiaries took, or had forced on them, the peace-risk on the money; Mr. Chua and the solicitors did well amid difficulties which baffle short description; the scheme was essentially the scheme sanctioned by the pre-war Court, so it cannot have been based on principles unknown to the law of Penang; no substantial grounds for impeaching the orders were disclosed and in any event the grounds relied on do not affect the purchasers. For all these reasons I am of opinion that the appeal ought to be allowed with costs, including two Counsel, here and below.

Spenser Wilkinson, J. : — The claim of the respondents, who were the plaintiffs in the Court below, was to recover possession of certain land sold and conveyed to the defendants during the Japanese occupation under Orders of Court made by the Japanese Court.

The facts are fully set out in the judgment of Jobling, J. and I do not think it is necessary to repeat them here. The learned Judge upheld the plaintiffs' claim on the ground that, under section 7 of the Japanese Judgments and Civil Proceedings Ordinance, 1946

(hereinafter referred to as Ordinance No. 29 of 1946), the defendants were debarred from pleading the Japanese decrees dated 5th and 10th August, 1943, which authorised the sale of the property in question to the defendants and that the defendants' claim to the land was therefore unsupported. Five of the six defendants appealed.

The main question dealt with in the judgment of the learned Judge was whether the provisions of section 6 of the Dealings in Land (Occupation Period) Ordinance, 1949 (hereinafter referred to as Ordinance No. 40 of 1949) affected in any way the provisions of section 7 of Ordinance No. 29 of 1946.

Section 7 of Ordinance 29 of 1946 and the relevant sub-sections of section 6 of Ordinance 40 of 1949 read as follows :—

[His Lordship, after quoting section 7 of the Civil Proceedings Ordinance, 1946 and section 6(2) and (3) of the Dealings in Land (Occupation Period) — which are given in full in the judgment of Taylor, J. **supra** — proceeded.]

The learned Judge decided that the provisions of the two Ordinances could be read together, that there was no inconsistency between them and that therefore the later Ordinance had no effect upon the earlier. In his judgment he states :—

"The two Sections read together can be paraphrased as follows: a Japanese decree may be registered in the Registry of Deeds and when registered shall have the same validity, force and effect as a decree of a competent Court except that it may not be pleaded in any Court unless an order of a competent Court has been substituted for it within six months of the date of the coming into force of the 1949 Ordinance."

With the greatest respect, however, it appears to me that this paraphrase of the provisions of two sections brings out very clearly the basic inconsistency between them. To say that a decree shall have the same validity, force and effect as a decree of a Court of competent jurisdiction except that it may not be pleaded, appears to me to involve a contradiction. If the decree is to have the *same* validity there can be no exceptions; as soon as exceptions are admitted the validity ceases to be the same. In my opinion, therefore, where in section 6(2) of Ordinance 40 of 1949 the Legislature has laid down that a registered Japanese decree shall have the same validity, force and effect as if it had been made by a Court of competent jurisdiction it means that that decree shall have the full force of an Order of a competent Court for all purposes whatsoever. It seems to me that to hold otherwise would result in permitting an earlier Ordinance to override a later one. Unless a proprietor of land can prove his title what is the value of section 6 of Ordinance 40 of 1949? It may well be necessary in some circumstances for a Japanese decree to be pleaded for this purpose, and in so far as section 7 of Ordinance 29 of 1946 might be thought to prevent this it must, I think, be deemed to be modified by the later enactment.

The respondents relied upon the provisions of sub-section (3) of section 6 of the later Ordinance as indicating that the Legislature did not intend to modify the earlier Ordinance. What, they asked, was the purpose of extending the time for substitution of a judgment of an appropriate Court, if substitution was not essential to the validity of a Japanese decree? I think the answer is that substitution may well be necessary or desirable in a variety of cases — for example where it is necessary to use the decision of a Japanese Court in another country; but by sub-section (2) the necessity for substitution for the purposes of that sub-section is expressly negatived by the words :—

"Where a Japanese decree was registered . . . . . such Japanese decree shall . . . . . have the same validity etc."

It is the Japanese decree itself that has the validity — not the substituted order of the appropriate Court. I think the provisions of sub-section (3) are consequential and ancillary provisions which cannot be held to modify or affect the interpretation of the plain words of sub-section (2).

For these reasons I am of opinion that it was permissible, in view of the provisions of section 6 of Ordinance 40 of 1949, for the appellants to plead these Japanese decrees in their Defence.

It is, therefore, not strictly necessary for me to deal with the argument put forward by the appellants to the effect that as this was a suit for recovery of land they were entitled to rely upon their title without pleading it in detail, but I will express my views on this point quite shortly. The respondents argued that not having pleaded expressly that the defendants were in possession the appellants cannot now rely upon a form of defence which they have not in fact pleaded. In view of the admission of facts made in the action on the 19th September, 1950 in which the defendants specifically admitted possession I cannot see any great force in this argument, which amounts to saying that the defendants ought to have pleaded what was already common ground. I think, therefore, that in this action, even if those paragraphs which expressly pleaded the Japanese decrees had been struck out of the Defence, the appellants would still have been entitled to give evidence of those decrees as a link in their title.

It was contended by Mr. Pooley on behalf of the respondents that the Japanese decrees in question

should be set aside now by this Court. His claim to be able to do this is based first upon paragraph 7 of the Amended Reply, which reads as follows:—

"7. In answer to paragraph 16 of the Defence the Plaintiffs say that if the orders mentioned in such paragraph can be pleaded by the Defendants (which is denied) the Plaintiffs are seeking in an action begun within 6 months after the commencement of the Dealings in Land (Occupation Period) Ordinance, 1949 to set aside the said orders."

In my opinion if this paragraph in the Reply was intended to be claim to set aside these decrees in this action then it was clearly a departure in pleading and should be disallowed. If, on the other hand, it was intended to be simply a statement of fact then it appears to me to be inaccurate. To my mind an action in which plaintiffs are seeking to set aside Orders must be one in which they make a specific prayer for this relief in their Statement of Claim. There is no such prayer in the Statement of Claim in this action. If when the plaintiffs in this case came to consider the defences they thought they ought to make a specific claim to set aside the decree they should have applied to amend their Statement of Claim. Not only did they not do this but at no stage of these proceedings, either in the Court below or in the Court of Appeal, has any application been made to amend. In my opinion the issues in an action must be decided upon the pleadings, and I do not think it is open to the plaintiffs without amendment to obtain relief which has nowhere in the pleadings been asked for.

In any event, the respondents were, even at the date of the hearing in the Court below, out of time. They argued that sub-section (2), in view of the definition of "action" in sub-section (4) which provides that this word is to "include" an application to set aside under Ordinance 29 of 1946, enables the plaintiff in any action to apply to set aside the Japanese decree so long as that action itself was commenced within the prescribed six months. I find myself unable to read sub-section (2) in this light. It does not in my view purport to give any power to anyone to set aside a Japanese decree — it merely describes the kind of decree it is referring to as one that has not already been set aside or partially set aside. I think the words "unless it has been set aside ..... in an action begun within six months ....." are words of description — not words of enactment — and that they do not extend the jurisdiction to set aside Japanese decrees under the provisions of Ordinance 29 of 1946. However such an application is made — whether by originating motion, or by a motion in an action or by way of a claim in a statement of claim — the application must be made under the extended time allowed by sub-section (3) of the same section, within six months from the commencement of the Ordinance — i.e. before the 1st April, 1950. So that, on the principles laid down in *Marshall v. London Passenger Transport Board*[3] an amendment of this nature would probably not have been allowed at the hearing even if it had been applied for.

It was next argued that the Japanese decrees should be set aside *ex debito justitiae* on the principles laid down in the case of *Craig v. Kanssen*[4].

Whilst it is admitted by the appellants that there were certain irregularities in the proceedings which resulted in the Japanese decrees in question it does not seem to me that any sufficient ground has been put forward by the respondents on the facts which would justify the Court in holding those decrees to be nullities. It seems clear that Mr. Chua, who was *de facto* receiver of the property, and the one trustee, who was within the jurisdiction, were in doubt as to whether or not they should proceed with a sale, which had already been authorised by the Court of the Straits Settlements before the War; and their action in applying to the Court for directions appears to have been a proper one. The only other trustee in the country was in Ipoh, which was certainly not within the jurisdiction of any Court in Penang until the establishment of the Malayan Union. Although the proceedings before the Japanese Courts, which ought strictly to have been brought in Suit No. 81 of 1935, were in fact brought by means of two separate originating summonses, I do not think that the proceedings were thereby entirely vitiated. Again, Lee Sau Yeng was appointed in Originating Summons No. 50 of 2602 to represent all the beneficiaries of the Estate of Cheang Keng Quee deceased and although a second appointment of the same lady was not made in Originatng Summons No. 44 of 2603 she entered an appearance in those proceedings on behalf of the beneficiaries and appeared by counsel in those proceedings, and it seems clear that the matter proceeded upon the basis that she had been appointed for the purpose of all proceedings relating to this particular estate. It seems to me that any defect in her appointment to represent the beneficiaries in Originating Summons No. 44 of 2603 was purely technical. I do not think that the precise legal position of Mr. Chua Hock Hai as officer-in-charge of the Japanese Public Trustee's Office and as purported receiver under a Japanese administrative decree affects the matter. The application to the Court was made by one of the trustees, the beneficiaries were in substance represented and the other trustees were out of the jurisdiction. In

these circumstances it appears to me that under the Trustee Ordinance the Court had power to make a vesting order and therefore had power to appoint Mr. Chua Hock Hai or any other person to convey the property.

The respondents claimed that as a result of the action of the trustee in this case the beneficiaries have suffered a heavy loss. It is to be observed that the result of the proceedings in the Japanese Courts was to call off an already permitted sale at the price of $450,000 and to substitute a new sale at the price of $935,000 — more than double the nominal price. The fact that as a result of subsequent events such of the money as was paid into Court was lost to the beneficiaries seems to me to be irrelevant. The important question is whether Mr. Chua and the trustee in 1943, in their then state of knowledge, were or were not doing their best for the benefit of the estate. In my opinion they were.

Apart altogether from these considerations I think there is another reason against setting aside these decrees on principles laid down in the English cases. The general position of Japanese decrees is peculiar. The Legislature has not declared them to be either valid or invalid. Instead they have been treated in a special manner and Ordinance 29 of 1946 was passed to deal with the very complicated situation which arose as a result of the Japanese occupation followed by the liberation of the country. I am unable to accept the contention put forward by Mr. Pooley that all Japanese decrees are basically nullities and invalid. He cited the cases of *In re Shaik Ramzan, decd.*[5] and *Suppiah Chettiar v. Ong Pee Koi & anor.*[8]. In each of those cases, however, the decree in question had already been set aside in earlier proceedings under Ordinance 29 of 1946 and in each case the argument was directed to whether anything could be claimed under the decree before it was set aside. Notwithstanding any dicta there may be in those cases to the contrary I find it impossible in the face of the provisions of Ordinance 29 of 1946 to conclude that a Japanese decree has not some effect: for if all Japanese decrees are considered nullities what could be the purpose of making provisions for appeals against them? Moreover, the validity in interlocutory matters of Japanese orders has, I think, been clearly recognised by the provisions contained in section 4 of the same Ordinance for carrying on the proceedings of the Japanese Courts. Whilst it is clear that for certain purposes a Japanese decree is of no avail and substitution of a judgment of the appropriate Court is necessary it by no means follows from this that all Japanese decrees are wholly inoperative.

In the judgment of the Master of the Rolls in *Craig v. Kanssen*[4] I find the following passage:—

> "Those cases appear to me to establish that a person who is affected by an order which can properly be described as a nullity is entitled **ex debito justitiae** to have it set aside. So far as procedure is concerned it seems to me that the Court in its inherent jurisdiction can set aside its own order and that it is not necessary to appeal from it."

Whilst it cannot be disputed that our Courts have an inherent jurisdiction in proper cases to set aside their own orders I am unable to see that they have any inherent jurisdiction to set aside orders of the Courts of the Occupying Power. There must, I think, be some statutory provision enabling them to do so. Nearly all the authorities cited to us on this subject were cases where the Courts of England had dealt with previous decisions of those Courts and in my opinion those decisions are not applicable to the position here, where the question is one of setting aside the decree of a Japanese Court made during the Japanese occupation of this country.

I am therefore of opinion that this Court cannot set aside a Japanese decree except under the provisions of Ordinance 29 of 1946; and I have already expressed the view that those provisions have not been invoked in these proceedings.

Another question argued on the appeal was whether section 75 of the Conveyancing and Law of Property Ordinance applies to this case so as to give the appellants a good title to the property in question. The respondents rely on the decision in *Jones v. Barnett*[7] and *Hambrough v. Hambrough*[8] for the proposition that this is a case to which the section does not apply.

In the first of these cases the Court had inadvertently dealt with the property of a complete stranger to the proceedings. There is nothing of this kind in the present case and I do not think that the decision in that case is of any assistance here. The case of *Hambrough v. Hambrough*[8] was not a decision upon section 70 of the Coveyancing and Law of Property Act (which is the equivalent of section 75 of our Ordinance), but upon the provisions of section 30 of the Trustee Act, 1893, and Warrington, J. who decided the case expressly refrained from setting aside the previous orders of the Court.

In any event I am of opinion that the English authorities are not in point in deciding this question, because we have here a statutory scheme contained in Ordinance 29 of 1946, Ordinance 40 of 1949 and the

Debtor and Creditor (Occupation Period) Ordinance, 1948 for dealing with the various difficulties arising from the Japanese occupation. Section 6 of Ordinance 40 of 1949 does much more than simply apply section 75 of the Conveyancing and Law of Property Ordinance to certain decrees. Before dealing with section 75 at all it lays down, in what seems to me to be clear and unequivocal language, that a registered Japanese decree shall, except in certain events, be of the same force and validity as if it had been made by a competent Court. Unless therefore any of the excepted events have occurred the decree must be valid and effectual. The section then gives the validated decree its full effect under section 75 of the Conveyancing and Law of Property Ordinance. The decrees in question in this action have not been set aside wholly or in part within the exceptions contained in section 6(2). They have therefore by Ordinance the same validity, force and effect as if they had been made by a Court of competent jurisdiction. I think it follows that they cannot now be attacked upon any of the grounds upon which the respondents now seek to attack them. Either the decrees must have been set aside or, in favour of the purchaser, they are valid; and any claims the beneficiaries may have are, by the effect of section 75 of the Conveyancing and Law of Property Ordinance, transferred to the purchase money.

My conclusions are that the learned Judge in the Court below placed a wrong construction upon section 6 of Ordinance 40 of 1949; that the appellants were at liberty either to plead or to prove the Japanese decrees in question; and that those decrees cannot now be set aside. I would allow the appeal with costs here and below, with a certificate for two counsel.

Wilson, J. : — The facts in this case are not in dispute and are set out in the judgment of Jobling, J. from which five of the original six defendants are appealing. In short the plaintiffs applied for and obtained :—

(a) a declaration that they were entitled to certain lands in dispute as trustees of the Estate of Cheang Keng Quee (deceased);

(b) a declaration that the Indenture dated the 25th day of August, 1943, purporting to convey the said land to the 1st, 2nd, 3rd and 4th Defendants is not binding on the Estate of Cheang Keng Quee;

(c) an order cancelling the Indenture;

(d) an account of the rents and profits received from the 1st April, 1946 in respect of the lands and payment for the amount found due; and

(e) possession of the land and premises.

The plaintiffs in their statement of claim alleged that there were four trustees of the Estate of Cheang Keng Quee, deceased, and that the Indenture of the 25th August, 1943 was executed only by one of the said trustees, Cheang Chee Choong, who is now dead, and by Chua Hock Hai, the Public Trustee, Penang, during the Japanese occupation, on behalf of the three other trustees of the Estate of Cheang Keng Quee, deceased, two of whom were the plaintiffs in this action. The Indenture purported to convey certain land to defendants Nos. 1, 2, 3 and 4 was executed by Cheang Chee Choong and Chua Hock Hai by the direction of defendant No. 6, Yeap Chor Ee, in consideration of a sum of $935,000. The plaintiffs alleged that the trustees of the estate of the deceased, other than Cheang Chee Choong, never agreed to sell or convey the lands to Yeap Chor Ee or to the defendants Nos. 1, 2, 3 and 4. Alternatively the plaintiffs alleged that if Chua Hock Hai, the Public Trustee, did in law represent the three trustees who were not parties in person to the Indenture he was not authorised by the Court or otherwise to sell the lands and premises to defendant No. 6, nor to defendants Nos. 1, 2, 3 and 4. The plaintiffs further alleged that defendants Nos. 1, 2, 3 and 4 wrongfully took and hold possession of the said lands and premises.

The 1st, 2nd, 3rd, 4th and 6th defendants denied by their amended defence that they wrongfully took and hold possession of the lands and alleged that the sale took place in compliance with the orders of the Court dated the 5th August, 1943, and 10th August, 1943, during the Japanese occupation, and they further alleged that these orders have not been set aside by any Court. The 5th defendant also contended that he had the right to convey the said lands and premises by the provisions of an administrative decree dated the 1st day of July, 1942, under which all estates, properties and effects which were prior to the 8th December, 1941, administered or managed under the Public Trustee's Ordinance (Cap. 60), or by firms, companies and individuals then deemed to be enemies and that all the powers, rights, duties, and privileges of the said Public Trustee, firms, companies and individuals must be deemed to have vested in the Japanese Public Trustee, namely defendant No. 5.

The learned trial Judge has found by reason of section 7 of the Japanese Judgments and Civil Proceedings Ordinance, 1946, that the defendants are debarred from pleading the Japanese orders referred to above and that the defendants' claim to the land is unsupported.

The first point for consideration is the interpretation of section 7 of this Ordinance. It is material to note that at the time of the passing of this Ordinance in 1946 there was in force an Ordinance entitled the

Courts (Restriction of Civil Jurisdiction) Ordinance, 1946. Under this latter Ordinance no Court constituted under the Courts Ordinance, 1946 had any jurisdiction to hear and determine any suit, action or other proceedings whatever relating to land wherein the cause of action arose during the period 7th December, 1941 to the 30th day of September, 1945. Accordingly section 7 of the Japanese Judgments and Civil Proceedings Ordinance, 1946, could not at the time of the enactment have had any practical application to a claim of the nature of the claim in this case. Furthermore, section 7 merely prohibited pleading Japanese decrees by way of set-off or counterclaim or otherwise. At that time the words "or otherwise" must have been intended to be construed *ejusdem generis* to set-off and counterclaim, and would not affect the pleading in the amended defence of 1st, 2nd, 3rd, 4th and 6th defendants. Since the enactment of the Ordinance, however, section 44 of the Interpretation and General Clauses Ordinance, 1948, has provided that the word "otherwise" is to be construed disjunctively unless there appears to be a contrary intention. It has, therefore, been argued that, by reason of this provision of the Ordinance of 1948, Japanese decrees cannot be pleaded in any circumstances whatever.

The Courts (Restriction of Civil Jurisdiction) Ordinance, 1946, which prohibited actions relating to land was repealed by Ordinance No. 24 of 1949 with effect from the 1st day of October, 1949, and on the same date the Dealings in Land (Occupation Period) Ordinance, 1949 came into operation. Sub-section (2) of section 6 of that Ordinance provides that where a Japanese decree was registered during the occupation period, or has been registered after the expiration of that period and before the expiration of three months from the commencement of this Ordinance or such extended time as the Court may allow, such Japanese decree, unless it has been set aside either before the commencement of this Ordinance or in an action begun within six months after such commencement, shall, in favour of a purchaser deriving title, whether mediately or immediately, to any estate or interest in land through or under such decree, have the same validity, force and effect as if it has been made by a Court of competent jurisdiction, and the provisions of section 75 of the Conveyancing and Law of Property Ordinance shall apply to such Japanese decree in the same manner as if it were an order of the Court to which that section applies. In the Court below it was argued that this sub-section entirely repeals section 7 of the Japanese Judgments and Civil Proceedings Ordinance, 1946, so far as it concerns Japanese decrees which have been registered. It cannot be disputed that if a later act or part of such an act conflicts with an earlier act or part of it in such a way that no other reasonable interpretation is possible the later act must be held to have repealed the conflicting provisions of the earlier act. Cases have been cited before us to show that a later act must not be construed as repealing an earlier act or part thereof unless the later act can only be given a sensible meaning if it is treated as entirely repealing the provisions of an earlier act. I do not think that it is necessary to refer to these cases which have been cited to us as that general provision of the law has not been disputed. The question in this case is whether it is impossible to make section 7 of the Japanese Judgments and Civil Proceedings Ordinance, 1946, and section 6 of the Dealings in Land (Occupation Period) Ordinance, 1949 stand together. The learned trial Judge has paraphrased the two sections as follows :—

> "A Japanese decree may be registered in the Registry of Deeds and when registered shall have the same validity, force and effect as a decree of a competent Court except that it may not be pleaded in any Court unless an Order of a competent Court has been substituted for it within six months of the date of the coming into force of the 1949 Ordinance".

I am unable to agree that this is a correct interpretation of the two sections. To do so would, in my opinion, necessitate holding that sub-section (2) of section 6 of the Dealings in Land (Occupation Period) Ordinance, 1949, does not mean what it says. On the other hand, I do not think that this sub-section repeals section 7 of the earlier Ordinance. Section 7 of the earlier Ordinance relates to any Japanese decree and came into force at a time when by reason of the Courts (Restriction of Civil Jurisdiction) Ordinance it had no application in practice, for the reasons already stated, to a claim of the nature of the claim in this case. When, however, the later Ordinance was repealed section 7 would have applied to such a claim if no other law were introduced. On the same date as the repeal of the Courts (Restriction of Civil Jurisdiction) Ordinance the Dealings in Land (Occupation Period) Ordinance, 1949, came into operation and sub-section (2) of section 6 lays down that in certain limited circumstances a Japanese decree shall have the same validity, force and effect as if it had been made by a Court of competent jurisdiction. In my view section 6 of this Ordinance whilst not repealing section 7 of the earlier Ordinance definitely created an exception to the general rule laid down in section 7 and to that extent modified section 7. Sub-section 2 of section 6 relates to a Japanese decree which has been registered. It has nothing to do with the substitution for it of an order

of a competent Court, and in my opinion it is impossible, on the wording of the section, to say that a Japanese decree when registered shall only have the same validity, force and effect as if it had been made by a Court of competent jurisdiction if an Order of a competent Court has been substituted for it. In my opinion if a Japanese decree as described in sub-section (2) could not be pleaded by reason of section 7 of the Japanese Judgments and Civil Proceedings Ordinance, 1946, it would not have the same validity, force and effect as if it had been made by a Court of competent jurisdiction. For these reasons I am of opinion that the defendants were not barred from pleading the Japanese decrees in their amended defence. If I were wrong in this I should still be of the opinion that the defendants were entitled to put these decrees of the Japanese Courts in evidence even though not pleaded. The plaintiffs in their statement of claim definitely alleged that the defendants Nos. 1, 2, 3 and 4 were in possession of the lands in dispute. The further amended defence of defendants Nos. 1, 2, 3, 4 and 6, together with the admission of facts, clearly raised the defence that 1st, 2nd, 3rd and 4th defendants were in possession of the disputed lands. It seems to me on the authority of *Danford v. McAnulty*[9] that in these circumstances it was unnecessary for the defendants to plead their title but that it was open to them to give evidence about their title in order to show that their possession was not wrongful and that their title was better than that of the plaintiffs.

The next point for consideration is a submission by Mr. Pooley that the Japanese Decree should be set aside. This could have been done on an application before the coming into force of the Dealings in Land (Occupation Period) Ordinance, or in an action (which includes an application) begun within six months after the commencement of the Ordiinance. The answer to this submission appears to me to be that this decree was not set aside before the commencement of the Ordinance, nor has there been any application to set aside the decree or any action to do so begun within six months after the commencement of the Ordinance. It is true that in the plaintiffs' amended reply to the defence and counterclaim it is alleged that the plaintiffs are seeking in an action begun within six months after the commencement of the Dealings in Land (Occupation Period) Ordinance, 1949, to set aside the said orders. This allegation is without foundation. No such claim was made in the Statement of Claim, and in my opinion it could not be made in a reply to the defence even if the wording in the reply amounted to a claim to set aside the decree, which, in fact, it does not because it would be a departure in pleading which is not permissible. This being so it is in my opinion unnecessary to discuss the reasons put forward by Mr. Pooley as to why the decree should be set aside, or the reason put forward by Dr. Withers-Payne why it should not be set aside. It is sufficient for me to say that even if all the parties necessary to an application to set aside a decree were before this Court, and the application had been made in time, I am not satisfied that sufficient reasons have been given as to why the Orders should be set aside.

Sub-section (2) of section 6 of the Dealings in Land (Occupation Period) Ordinance provides where a Japanese decree has been duly registered, and has not been set aside the provisions of section 75 of Conveyancing and Law of Property Ordinance shall apply to such decree in the same manner as if it were an order of the Court to which that section applies. It has been argued for the respondents that section 75 does not apply in this case and certain English authorities have been cited in support of this contention. In my opinion having regard to sub-section (2) of section 6 referred to above the English authorities cannot be applied to this case in any event, and further I consider that the facts of the case relied upon by the respondents can be clearly distinguished from the facts in these cases. Sub-section (1) of section 75 of the Conveyancing and Law of Property Ordinance reads as follows :—

> "An order of the Court under any statutory or other jurisdiction shall not, as against a purchaser, be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not".

In my view having regard to that sub-section the respondents cannot urge before this Court any want of jurisdiction in the Japanese Court, or any want or any concurrence or consent by the trustees other than Cheang Chee Choong, or notice to or service upon such trustees.

The last point to be considered is the submission by the respondents that Japanese decrees are invalid and nullities. It is unnecessary to consider the law in regard to Japanese decrees generally. I think it is sufficient to refer again to sub-section (2) of section 6 of the Dealings in Land (Occupation Period) Ordinance which provides that a Japanese decree such as the decree which is being attacked in this case when duly registered shall have the same validity, force and effect as if it had been made by a Court of competent jurisdiction. In the light of that specific provision I find it impossible to agree with Mr. Pooley's contention that all Japanese decrees are basically nullities and invalid.

For these reasons, I would allow this appeal with costs here and in the Court below.

Appeal allowed.